

Mariato Azlan v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
B-05-338-12 OF 2011 [IDN]
AZIAH ALI, TENGKU MAIMUN AND VARGHESE GEORGE JJCA
8 APRIL 2014

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Criminal Procedure — Witness — Credibility — Whether trial judge wrong to find eyewitnesses to crime credible — Whether testimonies of witnesses consistent with each other and corroborated medical, forensic and other evidence — Whether discrepancy in eyewitnesses' testimony as to time they saw crime being committed not material and did not require their recall

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The appellant's instant appeal was against his conviction and sentence by the High Court on a charge of murdering a man together with four others still at large about 7pm on 21 January 2007. The prosecution's case rested largely on the testimony of two eyewitnesses, SP4 and SP5. The murder weapon, a knife, was recovered by police from the crime scene and the chemist, SP17, stated that he found the presence of both the deceased's and the appellant's DNA on the knife's handle. The appellant's grounds of appeal were that: (i) the credibility of SP4 and SP5 was adversely affected by the fact they did not lodge a police report and by the fact that another witness, SP6, had testified that the crime took place about 8pm and not around 7pm as was claimed by SP4 and SP5; (ii) the trial judge's refusal to allow the appellant to recall SP4 and SP5, whose evidence was recorded by a predecessor judge, had prejudiced the appellant; and that (iii) SP17's testimony that there was a possibility the knife handle could have contained the DNA profiles of other persons showed a reasonable likelihood someone other than the appellant could have committed the murder.

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Held, dismissing the appeal and affirming the conviction and sentence:

- (1) The trial judge's finding as to the credibility of SP4 and SP5 was not so perverse as to merit appellate intervention. The discrepancy as to whether the time was 7pm or 8pm was not material. There was no doubt the deceased was stabbed on 21 January 2007. SP4 and SP5, both of whom knew the appellant, testified that they saw the incident at about 7pm and that they left the scene and returned at about 8pm. Their evidence was consistent with one another. Their reason for not lodging a police report was considered by the trial judge (see paras 12–13).
- (2) The trial judge did not err in refusing the application to recall SP4 and SP5. The application was made on the basis there were contradictions between their evidence and that of SP6 and not due to the emergence of

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- A new evidence. There was no issue of the appellant having been materially prejudiced by the refusal. No purpose would have been served by recalling SP4 and SP5 purely on the issue of the contradictions when the matter could be dealt with in the submissions (see paras 14–15).
- B (3) The evidence of the eyewitnesses was corroborated by the medical and forensic evidence. The finding of the knife added weight to the prosecution's evidence. The place where the knife was found lent credence to the testimony of SP4 and SP5 and confirmed the scene of the crime. The presence of the DNA of the deceased and the appellant on the
- C knife as the major and minor contributors respectively raised an irresistible inference the knife was the weapon used by the appellant to stab the deceased. The chemist's finding that the appellant was one of the donors of the mixed DNA profile developed from the handle of the knife remained unchallenged (see paras 18–19).
- D **[Bahasa Malaysia summary]**
- Rayuan perayu adalah terhadap sabitan dan hukuman oleh Mahkamah Tinggi atas tuduhan membunuh seorang lelaki bersama dengan empat orang lain yang masih bebas lebih kurang pada pukul 7 malam pada 12 Januari 2007. Kes
- E pihak pendakwaan bergantung keseluruhannya ke atas keterangan dua saksi, SP4 and SP5. Senjata yang digunakan dalam pembunuhan, sebilah pisau ditemui oleh polis dari tempat kejadian jenayah dan ahli kimia, SP17, menyatakan dia menemui kedua-dua DNA si mati dan perayu pada tangkai
- F pisau tersebut. Alasan rayuan perayu adalah bahawa: (i) kredibiliti SP4 dan SP5 terjejas oleh fakta mereka tidak membuat laporan polis dan atas fakta bahawa seorang saksi yang lain, SP6, telah memberi keterangan bahawa kejadian
- G jenayah berlaku lebih kurang pukul 8 malam dan bukan dalam pukul 7 malam seperti yang didakwa oleh SP4 dan SP5; (ii) keengganan hakim bicara untuk membenarkan perayu memanggil semula SP4 dan SP5, yang mana keterangan direkodkan oleh hakim terdahulu, telah memprejudiskan perayu; dan bahawa
- (iii) keterangan SP17 bahawa kemungkinan terdapatnya profil DNA orang-orang lain di tangkai pisau menunjukkan kemungkinan orang lain selain daripada perayu melakukan pembunuhan tersebut.
- H **Diputuskan**, menolak rayuan dan mengesahkan sabitan dan hukuman:
- (1) Dapatan hakim bicara terhadap kredibiliti SP4 dan SP5 tidak bertentangan untuk mewajarkan campur tangan mahkamah rayuan. Percanggahan terhadap sama ada masa adalah 7 malam atau 8 malam tidak material. Tiada kesangsian bahawa si mati telah ditikam pada 21
- I Januari 2007. Kedua-dua SP4 dan SP5 yang mengenali perayu, memberi keterangan bahawa mereka melihat kejadian tersebut pada pukul 7 malam dan bahawa mereka meninggalkan tempat kejadian dan kembali lebih kurang pukul 8 malam. Keterangan adalah konsisten antara satu sama lain. Alasan mereka kerana tidak membuat laporan polis telah

dipertimbangkan oleh hakim bicara (lihat perenggan 12–13).

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- (2) Hakim bicara tidak terkhilaf kerana menolak permohonan untuk memanggil SP4 dan SP5. Permohonan dibuat atas dasar terdapat percanggahan dalam keterangan mereka dengan SP6 dan bukan disebabkan timbulnya keterangan baru. Tidak terdapat isu perayu diprejudis secara material oleh penolakan tersebut. Tiada sebab untuk memanggil semula SP4 dan SP5 semata-mata atas isu percanggahan apabila perkara tersebut dapat diuruskan dalam penghujahan (lihat perenggan 14–15).

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- (3) Keterangan saksi disokong dengan keterangan perubatan dan forensik. Penemuan pisau menambah berat kepada keterangan pihak pendakwaan. Tempat di mana pisau ditemui memberikan kepercayaan kepada keterangan SP4 dan SP5 dan mengesahkan tempat kejadian jenayah. Kehadiran DNA si mati dan perayu pada pisau sebagai penyumbang utama dan minor masing-masing membangkitkan inferens yang tidak dapat disangkal pisau tersebut adalah senjata yang digunakan oleh perayu untuk menikam si mati. Dapatan ahli kimia bahawa perayu adalah salah seorang penyumbang profil bercampur DNA yang diperolehi daripada tangkai pisau kekal tidak dicabar (lihat perenggan 18–19).]

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Notes

For a case on credibility, see 5(2) *Mallal's Digest* (4th Ed, 2014 Reissue) para 5894.

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Cases referred to

PP v Hanif Basree bin Abdul Rahman [2008] 3 MLJ 161; [2008] 4 CLJ 1, FC (distd)

Sharma Kumari a/p Oam Prakash v PP [2000] 6 MLJ 790, HC (refd)

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Appeal from: Criminal Trial No 45B-53 of 2008 (High Court, Shah Alam)

Choong Kak Sen (Gooi & Azura) for the appellant.

Diar Isda Yazmin bt Ismail (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

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Tengku Maimun JCA (delivering judgment of the court):

[1] The appellant was convicted and sentenced to death by the High Court for the offence of murder. The charge against the appellant reads as follows:

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Bahawa kamu bersama-sama dengan empat orang yang masih bebas, pada 21 Januari 2007 jam lebih kurang 7petang, di kawasan tanah lapang Lorong Kemajuan 3, Kampung Pandan Dalam, Ampang di dalam Daerah Hulu Langat, di dalam

A negeri Selangor Darul Ehsan, di dalam meneruskan niat bersama kamu telah melakukan bunuh dengan menyebabkan kematian terhadap Fairus Bin Komari (No Paspot: AF 273417), dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan dibaca bersama dengan s 34 Kanun yang sama.

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[2] The facts have been well narrated by the learned trial judge. For brevity, we do not propose to reproduce it. Suffice to state that the prosecution's case rested on the testimony of SP4 and SP5 who witnessed the attack by several persons on the deceased. The murder weapon ie a knife was recovered from the scene. SP7 who conducted the post mortem on the deceased confirmed that the deceased died from a stab wound at the chest which penetrated the right lung. The evidence of the chemist ('SP17') established the presence of DNA of the deceased as the major contributor and the DNA of the appellant as a minor contributor on the handle of the knife.

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[3] The learned trial judge accepted the evidence of SP4 and SP5. His Lordship found that the prosecution had proved a prima facie case against the appellant. The appellant was called upon to enter on his defence. The gist of his evidence was that of a bare denial of the incident and of being present at the scene. On the totality of the evidence, the learned trial judge found that the prosecution had proved the charge against the appellant beyond reasonable doubt. The appellant was thus convicted and sentenced to death, hence the appeal before us.

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THE APPEAL

[4] Learned counsel for the appellant raised three main grounds of appeal which relate to the following issues:

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- (a) the credibility of SP4 and SP5;
- (b) the refusal of the learned trial judge to allow the recall of SP4 and SP5; and

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- (c) the evidence of SP17.

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[5] On the first issue, the complaint is founded on the evidence of SP4 and SP5 that the incident happened at around 7pm. This piece of evidence differed from that of SP6, a resident staying next to the place of incident. SP6 stated the time to be at 8pm. The crux of the submission of learned counsel for the appellant was that the discrepancy as to the time was material. Learned counsel argued that in the light of the failure by SP4 and SP5 to lodge a police report and the fact that the appellant was arrested six months after the incident, the discrepancy has affected the credibility of SP4 and SP5.

[6] The second issue arose out of the taking of the evidence of SP4 and SP5 before another judge. Learned counsel for the appellant had made an application to the learned trial judge to recall SP4 and SP5 but the application was refused. It was the submission of learned counsel that the learned trial judge erred in law in refusing the application which had prejudiced the appellant seriously.

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[7] As regards the evidence of SP17, the argument of learned counsel focussed on the reports dated 29 May 2007 (exh P38) and 4 October 2007 (exh P40). In exh P38, SP17 had stated as follows:

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iii A mixed DNA profile was developed from swab of the handle of the knife 'L' consistent with having come from at least two male contributors. The donor of bloodstained specimen 'J' (labeled 'Firdaus bin Komari') was consistent with being one of the contributors of the mixed profile. The other contributor could not be distinguished.

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[8] In exh P40, SP17 stated thus:

iii A mixed DNA profile was developed from swab of the handle of knife 'L' consistent with having come from at least two male contributors. The donors of bloodstained specimens 'J' (labeled 'Firdaus bin Komari') and 'A(M)' (labeled 'Mariano Azlan') were consistent with being the major and minor (partial at 14 loci) contributors of this mixed profile respectively ...

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[9] SP17 was asked in cross-examination whether there are other contributors other than the deceased and the appellant and his answer was:

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Kemungkinan itu ada, kerana saya telah gunakan perkataan sekurang-kurangnya dua orang tetapi daripada perbandingan ianya menunjukkan bahawa penderma specimen darah berlabel J iaitu Firdaus Komari dan juga penderma specimen darah A(M) Mariano Azlan adalah consistent kepada 16 locies.

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[10] Relying on the case of *Public Prosecutor v Hanif Basree bin Abdul Rahman* [2008] 4 CLJ 1, learned counsel thus submitted that there was a reasonable likelihood of the existence of another person or persons who could have committed the offence.

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OUR FINDINGS

[11] On the credibility of SP4 and SP5, the challenge is premised on the discrepancy between their evidence and the evidence of SP6 as to the time of the incident. We find that the learned trial judge has dealt with the discrepancy as can be seen from the grounds of judgment reproduced below:

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The case for the prosecution would be air tight if the evidence of SP4 and SP5 is to be believed and relied upon. The thrust of the defence attack was therefore against the reliability and acceptability of the evidence of this two eye witnesses.

- A** At the outset it must be stated that the testimony of these two witnesses was taken before another judge and I only continued from the 14th witness. In this case I found no reason to recall these two witnesses as the testimony recorded by my predecessor was clear and ambiguous.
- B** Demenour of a witness can be ascertained not only by seeing the witness in flesh, but can be equally effectively be ascertained by perusing the answers given by the witness when testifying. On reading the testimony of these two witnesses SP4 and SP5 the thing which struck me was their unwavering testimony as to how the incident took place. The testimony could only come from a person who had seen with his own eyes the incident taking place.
- C** There was absolutely no reason for the witnesses to make up a story in order to frame up the accused. There was no evidence elicited from these two witnesses that they bore a grudge against the accused serious enough for them to tell lies in court. To me the evidence of these two witnesses was not at all tainted.
- ...
- D** The defence contended that the evidence of these two witnesses could not be relied upon as their evidence of the time when the incident took place differed from the evidence of SP6. Both the witnesses had stated the time of the incident to be before the maghrib prayers whereas SP6 stated the time as 8pm. The core of the argument as to time is that if the incident had taken place at 8pm the place would be dark and the two witnesses could not have seen the incident.
- E** To me the contention of the defence does not hold water as the place of the incident was a housing area surrounded by houses therefore surely the place would not be in total darkness at 8pm.
- F** [12] Learned counsel for the appellant challenged the finding of the learned trial judge that the place would not be in total darkness. The finding, submitted learned counsel was purely a speculation. In our view, the finding of the learned trial judge as to the credibility of SP4 and SP5 was not so perverse as to merit an appellate intervention. We may add that discrepancy as to the time of
- G** around 7pm and 8pm was not a material discrepancy. There was no doubt that the incident of the stabbing of deceased did happen on 21 January 2007.
- [13] SP4 and SP5 testified that they had seen the incident at about 7pm. Their evidence is consistent with one another. They left the scene and returned later at about 8pm. Both SP4 and SP5 knew the appellant. They explained the reason why they did not lodge a police report. SP4 said 'takut diserang orang Marianto'. SP5 had also said 'takut, tak mahu terlibat'. Their failure to lodge a police report had been considered by the learned trial judge as follows:
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- I** A further bone of contention raised by the defence against these two witnesses SP4 and SP5 was that they did not notify the police of the incident. To me this concern of the defence was of no consequence. There could be numerous reasons for both these witnesses being foreigners to refrain from unwanted attention from the authorities. Although their conduct was not excusable it did not make their testimony any less credible.

[14] In respect of the recall of SP4 and SP5, the discretion lies on the learned trial judge whether to grant the application or otherwise. And the consideration is whether the appellant would be materially prejudiced by the refusal (see *Sharma Kumari a/p Oam Prakash v Public Prosecutor* [2000] 6 MLJ 790).

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[15] The application to recall was made on the basis that there were contradictions in the evidence. The recall was not due to some new evidence which came about, necessitating the recalling of SP4 and SP5. In refusing the application the learned trial judge said that the contradictions were in the record and that learned counsel may submit on the contradictions. We find no error on the part of the learned trial judge in so ruling. There was no issue of the appellant being materially prejudiced by the refusal. No purpose would have been served by recalling SP4 and SP5 purely on the issue of contradictions in their evidence and that of SP6 when the matter could be dealt with in the submissions.

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[16] As for the evidence of SP17, we noted that the appellant was arrested on 14 August 2007 and the blood specimen of the appellant was received by SP17 on 21 August 2007. Upon analysis, SP17 found that the appellant was the minor contributor of the mixed DNA profile developed from the swab of the handle of murder weapon, hence the report in exh P40. The essence of the argument of learned counsel was that since SP17 did not rule out the possibility of contributors other than the deceased and the appellant, there was a reasonable likelihood of another person or persons committing the offence.

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[17] In our view, the case of *Hanif Basree*, relied upon by learned counsel is distinguishable. There, the prosecution had relied on circumstantial evidence. In affirming the acquittal and discharge of the accused, the Federal Court found that the most damning evidence against the prosecution was the presence of the man with the foul body odour in the apartment where the deceased was found murdered and the scientifically proven DNA of the 'Unknown Male 1'.

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[18] In the instant case, there were eyewitnesses whose evidence was corroborated by the medical and forensic evidence. As found by the learned trial judge, the finding of the knife added weight to the evidence of the prosecution. The place where the knife was found lends credence to the testimony of SP4 and SP5 and confirmed the location of scene. The presence of the DNA of the deceased and the appellant on the knife as the major contributor and minor contributor respectively raised an irresistible inference that the knife was the weapon used by the appellant in stabbing the deceased.

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- A [19] It must not be overlooked that the appellant was charged with four others at large and the finding made by SP17 that the appellant was one of the donors of the mixed DNA profile developed from the handle of the knife remained unchallenged.
- B [20] Based on the aforesaid, we find that there were no merits in the grounds raised by learned counsel for the appellant. In our judgment, the conviction of the appellant was safe. We therefore unanimously dismissed the appeal and affirmed the conviction and sentence of the High Court.
- C *Appeal dismissed and conviction and sentence affirmed.*

Reported by Ashok Kumar

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